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by Heshmatollah Samavati



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by Heshmatollah Samavati*

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Abstract

The article examines provisions related to the termination of contracts in the UAE Civil Transactions Law and illustrates how the UAE Courts interpret the rules laid down by this law. These provisions do not repeal any special law related to the same subject; they only relate to the subject of the contract in general. In order to express the meaning of termination, the UAE contract law uses the Arabic word faskh. Based on the manner of termination, the UAE law provides four types of termination:

- 1. Termination by mutual agreement after the conclusion of the contract;*
- 2. Termination by judicial decision;*
- 3. Termination by prior agreement;*
- 4. Termination by law;*

Among these types, termination by judicial decision is regarded as a general rule applicable to all disputes occurring between individuals. However, in accordance with article 274 of the UAE Transactions Law, the effects of all types of terminations are the same on the contracting parties and the third party, except when a contract is terminated by mutual agreement after its conclusion (iqala). The effects of iqala on the third party vary from other types of termination.

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I. Introduction

Sometimes the contracting parties or one of them may not meet all the requirements of the contract. This failure may be due to the act of both parties or one of them or the circumstances surrounding the parties. Failure to fulfill the right of others to contract leads to harm to the other party. Therefore, the law has not left this matter without giving some solution. As it provides a solution to eliminate the damage caused by the failure to meet the requirements of contracts, the fulfillment of the contract may be accompanied by the possibility of its dissolution. In general, the reasons for the dissolution of contracts are not related to the nature of the contracts in transactions.

The termination of the contract is not a recent subject but an ancient theme of the Romans in their era and applied in a narrow field. The contracts of the Romans were not accompanied by revocation, and there was no way for the contracting parties to demand that they be terminated. Therefore, the other party could only submit an application for the execution of the obligations of the contract.¹

At present, the termination of contracts is significant and essential, and the study will highlight some of the greatness of the Arab countries' legislations, which do not order anything that might put someone in a tight and critical position, and do not prevent anything unless there is an alternative, so that the purpose of ordering or prohibiting in the form of legislation brings benefits to the people and prevents them from any harm in the present and the future. The provisions on the termination of contract in the UAE's laws and legislations have the same purpose. In this article, we shall study the nature of termination, reasons for termination, types of termination, and the effects of termination on the contracting parties and on the third party.

II. Definition of Termination

When a contract is valid and enforceable, it must be executed. The execution is the natural way for the termination of the contractual relationship and by that the contract dissolves. However, there are some matters that may lead to the dissolution of a contract before its execution or before the execution can be completed by the parties. These matters may occur during the conclusion of an agreement or in the future only. In immediate execution contracts (e.g., a sale contract), the termination of the agreement may occur during its conclusion; and in the United Arab Emirates, like other Arab countries, this is called *faskh*.²

In Arabic dictionaries, the word termination (*faskh*) has three meanings:

1. Weakness of wisdom and body;
2. Lack of knowledge, which refers to the weakness of wisdom;
3. Cast or take off (for example, I take off my clothes).³

¹ For more details, see ELIAS NASSIF, *Al mawsū'a al-Uqood al-Madania wa al-Tijariyah* (Encyclopedia of Civil and Commercial Contracts), Dar Al-Nahda Al Arabiya, Beirut 1974, at 582-583.

² In French law, it is called *résolution*. It should be noted that the UAE Civil Transactions law (like the Egyptian civil law) is under the influence of the French civil law.

³ AL ZUBAIDI, *Taj Al Arus* (Arabic), Vol. 7, Al Torath al-Arabi, Kuwait 1965, at 319; SA'ID AL SHARTUNI, *Aqrab al-Mawarid* (Arabic), Part 2, Ayatollah Marashi Najafi Library Publications, Qom 1983, at 926.

In addition, Ahmad bin Faris bin Zakariya in his book explains that the word *faskh* means breaking of a thing or object.⁴

However, as a legal term, *faskh* means revocation (of agreement), rescission (of sale), disaffirmance, repudiation, dissolution, countermand, annulment, recall, setting aside, reversal.⁵ In the eyes of the UAE Law, *faskh* is a form of recompense (or sanction or penalty) for the infringement of performance of an obligation, such as misrepresentation and its existence of conditions, which empower the injured party to terminate the agreement. Article 190 of the UAE Civil Transactions Law states: "If the misrepresentation is made by a person other than the contracting parties, and the person to whom the misrepresentation was made proves that the other contracting party knew of the misrepresentation, it shall be permissible for him to cancel the contract".

Therefore, this case differs from the breach of agreement at the time of its formation. The necessary elements to form and create an agreement are described in Article 129 of the UAE Civil Transactions Law⁶. Lack of any of these elements makes the agreement void (*butlan al-aqd*).

III. Reasons for Termination

The basis of the agreement, essentially, is the consent of the parties that can be shown by offer and acceptance. However, sometimes the parties or one of them is unable to fulfill all requirements of the agreement. This may happen when failure is resulted from the parties or one of them or from the circumstances surrounding the parties. Non-fulfillment of the parties' right leads to damages to the innocent party. To compensate these damages and in certain circumstances, the law gives the right to the injured party to terminate the agreement but in the manner prescribed by the legislator.

IV. Types of Termination

According to Article 267 of the UAE Civil Transactions Law, an agreement may be terminated in several ways, namely by mutual consent or by an order of the court, or under a provision of the law.

Therefore, four types of termination can be detected in the UAE Law: termination by mutual agreement after the conclusion of the contract, termination by judicial decision, termination by prior agreement, and termination by law.

1. Termination by mutual agreement after the conclusion of the contract

The UAE Civil Transactions Law recognizes the right of cancellation of the contract by the parties' mutual consent after the contract's conclusion. Article 268 stipulates that "[t]he contract-

⁴ AHMAD BIN FARIS BIN ZAKARIYA, *Mu'jam al-maqayis fi'l-luqah* (Arabic), Dar al-fikr, Beirut, without date, at 846.

⁵ HARITH SULEIMAN FARUQI, *Faruqi's Law Dictionary* (Arabic-English), Librairie du Liban Publishers 2001, at 257.

⁶ Article 129: "The necessary elements for the making of a contract are: (a) that the two parties to the contract should agree upon the essential elements; (b) the subject matter of the contract must be something which is possible and defined or capable of being defined and permissible to be dealt in; and (c) there must be a lawful purpose for the obligations arising out of the contract." It should be noted here that the UAE Civil Transactions Code has been translated from Arabic into English. The following book is considered as a reliable English translation of this law: WHELAN JAMES / HALL MARJORIE J., *The Civil Code of the United Arab Emirates: the law of civil transactions of the state of the United Arab Emirates*. Translated from Arabic into English by James Whelan & Marjorie J. Hall. Graham & Trotman, London/Boston 1987.

ing parties may mutually cancel the contract by their mutual consent after entering into the contract". Hence, it is permissible that the parties revoke the agreement by mutual consent after the contract has been concluded and be restored to the position they were in before the contract was made. Such termination is valid and in the UAE, like in other Arab countries, it is called *iqala*. According to Article 270 of the UAE Civil Transactions Law "[r]evocation (al *iqala*) shall be by offer and acceptance in the session (*majlis*), and by receiving (back the thing contracted for) on condition that the subject matter of the contract is in existence and in the possession of the contracting party at the time of the revocation, and if part of it has been lost the revocation shall be valid as to the remainder to the extent of the amount of the consideration attributable to it."

The Dubai Court of Cassation, by referring to the articles 268, 269, and 270 of the same law, has deduced that these articles together show that the cancellation of contract by mutual consent of the parties (*iqala*) is an agreement by that the obligation arising from the contract between the parties will expire and consequently it causes dissolution of the contract as well as the expiration of the obligations (regardless whether they were executed and whether their execution was completed or not). And that the basic condition for the validity of the *iqala* is the consent of the contracting parties. To find out whether the consent of the contracting parties exists or not, which is a factual matter, the court has the power to gather and review the facts of the case.⁷

The nature of the *iqala* is a matter of dispute. There are three views on this issue: the first view takes *iqala* into account as a new agreement. The second view considers it as termination by agreement. Finally, the third view considers *iqala* to be a termination between the parties and a new agreement in respect to the third party.⁸ The last one has been followed by the UAE Law.⁹

2. Termination by judicial decision

Principally, contract termination is made by judicial decision. As a general rule, this is applicable to all disputes between individuals. In other words, the judge is the one who determines the dispute between the opponents.¹⁰ Article 272 of the UAE Civil Transactions Law provides that: "(1) In contracts binding on both parties, if one of the parties does not do what he is obliged to do under the contract, the other party may, after giving notice to the obligor, require that the contract be performed or canceled. (2) The judge may order the obligor to perform the contract forthwith or may defer (performance) to a specified time, and he may also order that the contract be canceled and compensation paid in any case if appropriate".

This article is similar to the Article 1184 of French Civil Law of 1804 which states that "[t]he resolutive condition is always implied in synallagmatic contracts, for the case where one of the two parties does not carry out his undertaking. In that case, the contract is not avoided as of right. The party towards whom the undertaking has not been fulfilled has the choice either to compel the other to fulfill the agreement when it is possible or to request its cancellation with

⁷ The decision is dated 26/02/2007 in Petition No. 275/2006, Commercial Petition, see Collection of Judgements of the Court of Cassation, Dubai Courts, Rights, Vol. 1 (2007), at 23.

⁸ For more details see, ABD AL MAJID AL HAKIM, *Al Mujez fi sharh al-qanun al-madani* (Arabic), Part 1, Nadim Publisher, Baghdad 1974, at 440- 442.

⁹ Article 269 of the UAE Civil Transactions Law provides that "[s]o far as concerns the contracting parties revocation amounts to cancellation, and with regard to a third party amounts to a new contract".

¹⁰ In French law, this kind of termination is called *la résolution judiciaire*.

damages. Cancellation must be applied for in court, and the defendant may be granted time according to circumstances".¹¹

a) *Conditions of termination*

In order for the court to make a decision on the termination of an agreement, the following conditions should be present:

First Condition: *Binding Contracts*

As the UAE Civil Transactions Law has provided, some contracts are binding, and some of them are not. Article 218 of the same law gives a definition of a non-binding contract: "(1) A contract shall not be binding on one or both of the contracting parties despite its validity and effectiveness if there is a condition that such party may cancel it without mutual consent or an order of the court. (2) Each party may act unilaterally in canceling it if by its nature the contract is not binding upon him or if he has made it a condition in his own favor that he has the option to cancel."

However, the binding contract is an agreement which none of the contracting parties may revoke, modify or rescind it except by mutual consent, order of the court or a law provision.¹² Therefore, termination of an agreement can only occur in binding agreements.

Second Condition: *One party's failure to fulfill any of its contractual obligations*

When one of the contracting parties has failed to perform his obligation, the other party has two options. The first option is to seek the execution of the obligor's obligation from the court; and the second option is to ask the court to terminate the agreement, provided that he has already sent a notice to the obligor. Article 272 of the UAE Civil Transactions Law clearly states that before referring the case to the court, the party who is seeking termination of the contract must send a notice to the obligor requiring the contract to be performed or canceled. However, the mere opening of a file for termination is in itself considered to be a notice to the defendant. However, it should be noted that giving notice before stating the claim of termination possesses practical importance since the judge can give a quick response to such a claim.¹³

Third Condition: *The party requesting termination to be performed or is prepared to carry out his obligation*

If the obligee does not fulfill his obligations or if he is not ready to perform, he has no right to claim for termination of the agreement. The reason being that in such a condition, he fails to perform his obligations. If one party seeks for termination of the contract, he needs to fulfill his obligations. For example, if a buyer wants to terminate the agreement, he must prove that he has paid the price or, at least, that he is willing and ready to pay the price. However, if a seller seeks for termination he must prove that he has fulfilled his obligations or he is ready to perform his obligations. In conclusion, if the buyer refuses to fulfill his obligation without any right he cannot resort to termination. The same rule is applicable to the seller.

¹¹ This article has been modified by the Order No. 2016-131 of February 10, 2016, art. 2.

¹² Article 267 of the UAE Civil Transactions Law.

¹³ AL SANHOURI, *Al-Wasīf fi sharh al-qānūn al-madānī* (Arabic), Vol. 4, Dar Ihya al-Turath al-Arabi, Beirut, without date, at 821.

Fourth Condition: *The party requesting termination is able to return the situation to its original if it is ruled to be terminated*

The effect of termination is that the two contracting parties shall be restored to the positions they were in before the contract was made. In case that this is not a possibility anymore, compensation shall be ordered. The contracting party who insists on the termination is required to be able to restore the situation to what it was before. However, if the contractor is unable to do that, he has no right to resort to the termination of the agreement. In this a situation, on the request of the obligee, the court may enforce the obligor to perform the agreement or may order him to pay compensation to the obligee. Furthermore, if a part of the subject matter of the contract has been delivered to the buyer and he sells it to another person or converts it from one condition to another condition (such as when the buyer buys some clothes but only receives part of the goods and changes them into dresses) he has no right to cancel the agreement.

Fifth Condition: *Sending notice to the other party*

The obligee must send a notice to the other party regarding his refusal of his obligations' fulfillment. This notice is essential as it is a requirement for filing a termination case.

Sixth Condition: *Obligee's request for termination of the agreement without its performance*

Certainly, if the obligee asks for the performance of the agreement the court takes this request into consideration as far as possible.

Seventh Condition: *The obligor remains in his position*

In determining the cancellation of the contract, the obligor is liable if the court considers that no action is being taken to fulfill his obligation. Therefore, he remains in his position. However, if he takes steps to fulfill his obligations, the judge has the discretionary power to decide on compensation for delay in performance, in case there is place for compensation.¹⁴

b) The discretionary power of the court

As we will explain later, in contrast to termination by prior agreement, termination by judicial decision does not limit the discretionary power of the judge. When the obligee asks for termination of an agreement as a result of the obligor's non-performance of the contractual obligation, the judge is not obliged to accept his request but he has a right to give time to the obligor to fulfill his obligation in soft conditions to enforce the payment of the compensation (where appropriate). However, if the obligee seeks the execution of the contract and the obligor is able to perform his obligations, the judge must accept this application but he can also decide on compensation (if it is considered necessary).

Where there has been partial performance of some aspects of a contract, the judge can restrict his judgement for compensation of the unperformed part of the contract, provided that the partial performance relates to the most important part of the obligation. Nevertheless, the judge can always accept the obligee's application for termination of the agreement and rule on the matter where appropriate.¹⁵

¹⁴ For more details, see HASAN AHMAD ABD AL KHALIGH, *Al wajize fi sharh Qanun al-moamelat al-madania* (Arabic), Part 1, Dubai Police Academy 2007, at 223.

¹⁵ Ahmad, *supra* n. 14, at 223.

3. Termination by prior agreement

Sometimes the parties forecast the non-performance of an obligation by one of them at the time of the contract's conclusion and agree on stipulating a clause in the agreement that in case of non-fulfillment by either one of the parties the agreement shall be canceled or considered to be canceled without the need of a judicial decision. Such a clause is valid under the UAE law. Article 271 of the UAE Transactions Law prescribes that "[i]t shall be permissible to agree that a contract shall be regarded as being canceled spontaneously (automatically) without the need for a judicial order failing performance of the obligations arising thereout, and such an agreement shall not dispense with notice unless the contracting parties have expressly agreed that it should be dispensed with." This type of termination is called *faskh al- itefaghi* or termination by agreement in the UAE law.¹⁶

It is established by the judgments of the Dubai Court of Cassation that:

"[...] It is the principle in contracts giving priority to the *Autonomie de la Volonte*, i.e. autonomy of the will principle; thus, *Pacta Sunt Servanda*, i.e. the contract makes the law between the contracting parties, and, accordingly, none of the contracting parties may unilaterally rescind, amend or cancel the contract unless upon the consent of the other contracting party or by law in accordance with the provision of Article No. 267 of the Civil Transactions Law."¹⁷

The Court of Cassation has defined this kind of termination as follows:

"[...] Termination by agreement means that the contract contains a cancellation by agreement clause stipulating the contract to be regarded as being cancelled automatically without the need for a court judgement when the obligations arising from the contract or one of them are not fulfilled. It is called 'explicit cancellation condition', and then the termination here is definitely compulsory when the breach of the contractual obligation occurs, and the contractor or the judge has no choice between cancellation and execution of the contract. Here the decision of the court shall discover the occurrence of cancellation and does not create the contract termination status."¹⁸

In addition, the same Court has emphasized that the law does not require specific words for the explicit cancellation condition.¹⁹

An agreement on termination has several forms and each form has a different effect. In the following, attention shall be drawn to some remarkable points.

Firstly, sometimes the parties agree that if one of them fails to fulfill his obligation the agreement will be deemed to have been terminated. On the one hand, such phrase only illustrates the uncertainty in the general rule of termination and it does not add anything to such a rule.

¹⁶ In French law, it is called *la résolution conventionnelle*.

¹⁷ The Decision is dated 18/11/2012 in Petition No. 347/2011 Real Estate Petition, see <<https://www.dc.gov.ae/PublicServices/LatestVerdicts.aspx?lang=en>> (last accessed 14 May 2019).

¹⁸ Union Supreme Court of Cassation, decision dated 17/03/2013 in Petition No. 576/2012 Commercial Petition, at 3.

¹⁹ The Decision dated is 10/07/2008 in Petition No. 92/2008 Commercial Petition, see Collection of Judgements of the Court of Cassation, Dubai Courts, Rights, Vol.1 (2008), at 1097.

On the other hand, if the condition occurs, it is hard to reach the conclusion that the parties have definitely intended to cancel the agreement. Therefore, the obligee is not exempted from the duty of sending a legal notice to the obligor and must open a termination file in the court. Also, the agreement does not deprive the judge of his discretionary power in relation to the termination of the contract. Moreover, the obligor has the right to prevent the termination of the agreement by the performance of his obligations.²⁰

In a decision of the Dubai Court of Cassation, this matter has been explained as follows:

"[...] It is established under the judgments of this court that the termination based on implicit termination clause established under the law for all contracts binding on both parties, as implied from Article No 272 of the Civil Transactions Law, grants the obligor the right to avoid the termination by fulfilling the debt before the rendering of a final judgment in the lawsuit, as long as it is not evident that the delayed fulfillment is alleged by the obligee. That is to say for affording a satisfactory answer to the claim for termination in such case, the other party to the contract should remain late in fulfilling the obligation thereof till the rendering of a final judgment for the termination. Further, the implicit termination clause does not necessitate the termination, even upon the occurrence of failure to fulfill the obligation, rather, it is subject to the estimation of the judge who is entitled to allow a period of time to the obligor in order to avoid the termination as stated above. The estimation of the judge in this regard is not subject to the supervision of the court of cassation as long as the judge based the judgment thereof on apposite grounds derived from the papers. Further, it is established that the obligor may, before the issuance of the final judgment, fulfill the obligation thereof and avoid the termination."²¹

Secondly, sometimes the parties agree on the contract to be terminated spontaneously. Such an agreement does not exempt the obligee to not give notice or to not open a file in the court. However, it deprives the judge of his discretionary power and he has no right to give time to the obligor.

Thirdly, sometimes the parties agree to the contract being terminated spontaneously without the need for a judicial order. This does not exempt the obligee to not send notice. In a situation where the obligor fails to fulfill his obligation, the obligee must send him a notice and afterwards, if the obligor does not perform his obligation, the agreement is automatically terminated without the need for a judicial order. However, if the obligor claims to fulfill his obligations, the dispute should be raised before the court. Here, the duty of the judge will be limited to this claim. Therefore, if he finds out that the obligor has not fulfilled his obligations, he shall decide on the agreement to be canceled. Such a decision has the nature of discovering the fact that the agreement was terminated and it is not therefore creating the status of termination.

Fourthly, sometimes the parties agree that the contract shall be terminated spontaneously without the need to send notice or without a court judgment. In this case, when the obligor is unable to fulfill his obligations, the agreement will be canceled without the need for sending a no-

²⁰ AL SANHOURI, *supra* n.13, at 831.

²¹ Petition No. 403/2015 Real Estate Petition issued on 04/06/2016, at 3.

tice or obtaining a judgment from the court. This is the maximum requirement the cancellation of the agreement.²² The UAE Courts in several decisions has declared that with regard to the agreement of termination of a contract without warning or notice, the judge takes away his discretion in the matter of cancellation. Nevertheless, this shall be subject to the Court's verification of the existence of terminatory conditions by the agreement and necessity of its application.²³ However, the Dubai Court of Cassation has stressed that:

“[...] The provisions of articles 271 and 274 of the Civil Transactions Law stipulate that the contract is not considered to be automatically canceled when the obligations arising therefrom are not fulfilled unless the parties agree to that. And this condition must be set forth in a clear and unequivocal manner, indicating that the contract has been terminated definitely and automatically once the violation of the contract has been occurred, without the need for a court ruling when the obligation has not been fulfilled.”²⁴

As we can see, in the mentioned forms (except for the first one), the obligee has the right to ask for the performance of the agreement or for its termination. It does not prevent the obligee to request the performance of the agreement. Otherwise, the obligor will be at the mercy of the obligee; therefore, he can succeed in making the agreement to be terminated by refusing to perform his obligations if he wishes so. Also, we can reach the conclusion that based on the Article 271 of the UAE Transaction Law, termination by agreement leads to the deprivation of two guarantees, which the law provides for the obligor:

First guarantee (the option to choose between the execution of the contract or its termination): This guarantee is the option to choose between the execution of the contract or its termination. In the above form the agreement defiantly will be terminated without leaving the obligor and the judge the option of choosing between the performance of the contract and its termination. This option will remain for the obligee only.

Second guarantee (the necessity of referring the matter to the Court): The issue of termination of the contract does not require referral to the court unless the obligor raises a dispute about the performance of the agreement.

Indeed, deprivation of these two guarantees does not prevent the obligor to benefit from other protection such as the necessity of sending him a notice by the obligee.

In summarizing the condition of termination by prior agreement, we should emphasize that it is necessary that:

- (i) the agreement is a binding contract. Hence, as we have mentioned before, termination of agreement can only occur in binding agreements;
- (ii) one of the parties fails to fulfill the specific contractual obligation as described in the termination agreement;
- (iii) the party requesting termination has performed or is willing to carry out his obligation;

²² SANHOURI, *supra* n.13, at 832-835.

²³ For example, see the Union Supreme Court of Cassation, decision dated 29/10/2015 in Petition No. 533/2015 Commercial Petition.

²⁴ The decision dated 23/01/2011 in Petition No. 122/2010 Real Estate Petition, see <<https://www.dc.gov.ae/PublicServices/LatestVerdicts.aspx?lang=en>> (last accessed 14 May 2019).

(iv) the party requesting termination is able to return the situation to its original if it is ruled to be terminated.

4. Termination by law

Part one of the article 273 of UAE Civil Transactions Law provides that “[i]n contracts binding on both parties, if force majeure supervenes, which makes the performance of the contract impossible, the corresponding obligation shall cease and the contract shall be automatically canceled.” According to this article, if the performance of the subject matter of the contract becomes impossible and the impossibility is not related to the act of the obligor, the obligor’s obligations shall be terminated. Such as when a subject matter of the contract has been destroyed by a natural disaster. Here, for example, if the contract is a sale agreement, the agreement shall be terminated by the law, and the seller must return the price if he has received it from the buyer. In relation to the obligation of the buyer it must be said that his obligation is to pay some amount of money. Such an obligation is a debt in the hands of the buyer. Therefore, it cannot be destroyed materially. Article 565 of the Civil Transactions Law states that “[i]f a specific time for the payment of the price is laid down in the contract and it is stipulated therein that if the purchaser does not pay the price within that time then there will be no sale, then, if he does not pay the price and the property is still in the hands of the seller, the sale shall be deemed to be canceled”.²⁵

In understanding the concept of Article 273 of the UAE Civil Transactions Law, we shall mention articles 386 and 472 of the same law. Article 386 provides that “[i]f it is impossible for an obligor to give specific performance of an obligation, he shall be ordered to pay compensation for non-performance of his obligation, unless it is proved that the impossibility of performance arose out of an external cause in which (the obligor) played no part. The same shall apply in the event that the obligor defaults in the performance of his obligation”. In addition, Article 472 lays down that “[t]he right shall expire if the obligor proves that the performance of it has become impossible for him for an extraneous cause in which he played no part”.

Thus, the conditions of termination by law (*infesakh*) in brief are:

- i) the impossibility of performance of the agreement;
- ii) the impossibility must be caused by the third party and due to reasons that are not attributable to the obligor;
- iii) the impossibility must happen after the conclusion of the agreement;
- iv) the impossibility must concern the entire performance of the contract and not a part of the contract only. However, the part 2 of Article 273 of UAE Civil Transactions Law prescribes that “[i]n the case of partial impossibility, that part of the contract which is impossible shall be extinguished, and the same shall apply to temporary impossibility in continuing contracts, and in those two cases it shall be permissible for the obligor to cancel the contract provided that the obligee is so aware”.

²⁵ For more details, see HASAN AHMAD ABD AL KHALIGH, *Al wajize fi sharh Qanun al-moamelat al-madania* (Arabic), Part 3, 2nd edition, Dubai Police Academy 2008, at 236.

V. Effects of Termination of Contract

In case the parties cancel the agreement or the agreement is canceled automatically, the cancellation of the agreement shall result in ceasing the effects of the contract by retroactive effect and the contract shall be regarded as not having existed before. In such a situation, the parties shall be reinstated to the positions that they were in before the contract was made. Article 274 of the UAE Civil Transactions Law provides that “[i]f the contract is canceled automatically or by the act of the parties, the two contracting parties shall be restored to the position they were in before the contract was made, and if that is not possible, compensation shall be ordered”. This Article is similar to the Article 1183 French Civil Law of 1804 which stated: “The resoluto-ry condition – when fulfilled – brings the revocation of the obligation and puts things back in the same condition as if the obligation had not existed”²⁶.

Below, we shall discuss the effects of cancellation on the parties and the third party.

1. The effect of cancelation on the parties

In accordance with the provision in article 274 of the UAE Civil Transactions Law, in case the contract is terminated by agreement or by a judgment of the court, the termination of the contract shall result in restoring the contracting parties to the positions they were in before the conclusion of the contract. If, for example, a sale agreement is terminated, the parties of contract shall be restored to the position they were in before the contract was made, i.e. the buyer is not considered to have ever owned the subject matter of the sale agreement, and the seller is not considered to have possessed the price. As a result, the buyer must return the subject matter with its profits that have resulted before the cancellation. If the subject matter of the sale agreement, for instance, is a farm, he must return the farm with its crops (if they exist). Otherwise, he must pay the price of the crops to the seller. Also, the seller must give back the price with the legal interest from the date of judicial claim. The root of such an obligation goes back to the *unjust enrichment doctrine*.²⁷

In circumstances where it is not possible that one or both parties return the sale subject matter or the price, the court shall order compensation (as is mentioned in the article 274 of the UAE Civil Transactions Law). In its Decision No. 295 of 25/10/1998, the Dubai Court of Cassation emphasized that the content of article 274 is that when the contract is canceled by agreement or judgment, the result is the termination of the contract and it is considered to have never come into existence, and the parties return to the position in which they were before entering into the contract.²⁸ Therefore, all agreements, obligations, and undertakings included in the contract cease and come to an end. For example, if the parties have agreed in a contract on compensation or penalty for the violation of an obligation, the clauses shall lapse if the original obligation lapses by the termination of the contract.

²⁶ This Article has been totally modified by the Order No. 2016-131 of February 10, 2016, art. 2.

²⁷ Article 321 of the UAE Civil Transactions Law provides that “[a] recovery of property handed over without entitlement may be made if payment was made in satisfaction of a debt for which the cause had not existed, or for a debt of which the cause has ceased to exist after it had materialized”.

²⁸ See Collection of Judgements of the Court of Cassation, Dubai Courts, Rights, vol.1, 1998, at 706.

In this regard, the following two decisions of the Dubai Court of Cassation are worth mentioning. The first case is in respect of compensation:

"[...] It is established that the provision of Article No. 274 of the Civil Transactions Law implies that in case the contract is terminated by agreement or by a judgment of the court, the contract shall be dissolved and considered null and void and the contracting parties shall be restored to the positions they were in before the conclusion of the contract. Hence, the agreements and undertakings included in the contract shall lapse accordingly, the compensation provided for under the contract shall not count, and if the compensation is deemed necessary, then it shall be determined by the judge in accordance with the general rules which impose the burden of proving the harm, the realization and the extent thereof on the obligor."²⁹

The second decision concerns the penalty clause:

"[...] It is established, as applicable under the judgments of this court, that the termination of the contract, in accordance with the provision of Article No. 274 of the Civil Transactions Law, shall result in restoring the contracting parties to the positions they were in before the conclusion of the contract; and if such restoration is deemed impossible, then the compensation shall be ruled with. The consequences of the impossibility shall be borne in this case by the obligor whose obligation is deemed to be impossible to fulfill in operation of the principle of bearing the consequences in contracts binding on both parties. If the original obligation lapses with the termination of the contract, the penal clause agreed upon under the contract shall lapse as well on the consideration that such clause is an obligation subsequent to / dependent on the original obligation. Thus, the compensation estimated thereunder shall not count."³⁰

The last subject to be discussed here is the situation where one party does not return what he has obtained from the other party after the cancellation of the agreement. According to the Article 275 of the UAE Civil Transactions Law, with regard to the above mentioned situation, each party has the right to detain what he has received so long as the other party has not returned what he has received from the former, or has provided security for such return.³¹

²⁹ The decision dated 07/11/2010 in Petition No. 202/2010 Civil Petition, see Collection of Judgements of the Court of Cassation, Dubai Courts, Rights, Vol.2, 2010, at 1482.

³⁰ The decision is dated 23/09/2012 in Petition No. 09/2012 Real Estate Petition, see <<https://www.dc.gov.ae/PublicServices/LatestVerdicts.aspx?lang=en>> (last accessed 14 May 2019). Also in its other decision, the same court confirmed that: "It is established, as applicable under the judgments of this court, that the penal clause is an obligation dependent on the original obligation; since it is an agreement on a penalty for the violation of such obligation; thus, if the obligation lapses with the termination of the contract, the penal clause shall also lapse and the compensation estimated thereunder shall not count.", Judgment of the Dubai Court of Cassation dated 05/02/2012 in Petition No. 352/2011 Real Estate Petition, see <<https://www.dc.gov.ae/PublicServices/LatestVerdicts.aspx?lang=en>> (last accessed 14 May 2019).

³¹ Article 275: "If the contract is dissolved by reason of voidness or cancellation or through any other cause and each of the parties is obliged to return that which he has obtained, it shall be permissible for each of them to detain what he has received so long as the other party has not returned what he has received from the former, or provided security for such return."

2. The effect of cancelation on the third party

Article 274 of the UAE Civil Transactions Law applies to the rights of others as well as the parties to the contract. Therefore, for example, when it is said that the buyer is deemed to have never owned the subject matter after the termination of the sales contract, it means that the rights placed on the subject matter before cancelation ceases to exist, too. The seller recovers the subject matter of the sale free of any third-party rights. Accordingly, in a situation in which someone has sold a commodity to a person and he (the buyer) sells it or the property rights³² placed on the commodity (such as usufruct or the right of easement) to a third party and subsequently the first contract is canceled by the parties, the seller recovers the subject matter of the sale from the first buyer free of any attached property rights.

The legal bases of this rule are certain jurisprudential maxims such as “a person cannot transfer to other any right more than he has” or “who does not have a thing cannot give it to someone else”. In order for such an effect to take place, it is necessary that the cancelation claim is indicated on the margin of the original registration of the sale contract, and the second transaction occurs after that indication in the margin of the original registration of the sale contract. This is the case for real properties. However, in movable properties, the basic rule of possession of the movable object is that evidence for its holder creates the necessary protection for the third party and limits the effect of the dissolution of the original contract as against others.³³ It means that if the subject matter of the sale is movable and the first buyer sells and delivers it to the second buyer, and then the first seller cancels the sale agreement, he cannot recover the subject matter from the second buyer who had a good intention. That is because he owned the subject matter by possession. Therefore, the seller shall reimburse the first buyer for compensation. On the other hand, if the second buyer did not receive the sale subject matter, or he had bad intention, it cannot be said that he owned the sale by possession. As a result, the subject matter returns to the seller and the second buyer must go back to the first buyer to recover his money.³⁴

3. Effects of termination by mutual consent

In relation to termination by mutual consent after the agreement, it is interesting to know that the termination has no effect of returning the contracting parties to the position that they were in before the contract was made. To the third party, termination by mutual agreement after the conclusion of the contract has been recognized as a new agreement. Article 269 of the UAE Civil Transactions Law states that termination, as far as it concerns the rights of the contracting parties, amounts to rescission and, in regards to third parties' rights, to a new contract. Therefore, its effect on other than the parties is limited to the future. For example, if someone sells a house to another person and then the buyer enters into a mortgaged agreement with a third party and later on, the seller and the buyer terminate the contract based on mutual consent, the termination of the agreement would not have a retroactive effect on the mortgagee. That is because such *iqala* is counted to be a new agreement. Therefore the seller in the first agreement is considered to be the buyer in the termination agreement (*aqad al' iqala*) and the buyer in the first agreement is considered to be the seller in the termination agreement. The termination

³² Article 109 of the UAE Civil Transactions Law states: “A property right is a direct power over a particular thing, given by law to a particular person”.

³³ AHMAD, *supra* n. 14, at 277-278.

³⁴ AL SANHOURI, *supra* n. 13, at 828.

agreement entails that the house is returned to its old owner while it is loaded with the mortgagee's right.³⁵

VI. Conclusion

In this study, we saw that the term of termination of contract means termination by agreement, by law, or by *iqala*. The study did not address the issue of termination of contracts by death of a contractor, by expiration of the contract, by execution (of contract) or by lack of leave in the suspended contract. In our research, the termination of the contract was described in its general concept, which consists of a single objective system. The research was based on the rules and regulations of the same concept in order to clarify the overall legislative idea in regards to termination.

Although termination can be divided into different main types, we have only discussed the kinds of termination that occur by mutual agreement of the contracting parties or by law or by judicial decision. Both UAE law and the judicial precedent show that in the comparison between termination by prior agreement and termination by judicial decision, the latter is regarded as a general rule applicable to all disputes between individuals. However, the effects of both types of terminations on the contracting parties and on the third party are the same.

³⁵ Ahmad, *supra* n. 14, at 263.